SUPREME COURT OF THE UNITED STATES.

No. 271.

JARED H. CLARK AND CHARLES A. SMITH AS J. H. CLARK & CO., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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Petition.

To the honorable the Court of Claims of the United States of America:

Your petitioners, Jared H. Clark and Carlos A. Smith, respectfully show: that on the fifteenth day of June, A. D., 1863, at Cleveland, in the State of Ohio, they were partners in business under the name and style J. H. Clark & Co., and continued to be partners in business under said name and style until the fourteenth day of January, A. D. 1864, when said partnership was dissolved by mutual consent.

Your petitioners further show: that they are citizens of the United States, and reside in Cuyahoga county, State of Ohio; that the said Jared H. Clark and Carlos A. Smith. have at all times borne true allegiance to the government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government.

Your petitioners further show: that on the fifteenth day of June, A. D. 1863, at Cincinnati, in the State of Ohio, Major Beekman DuBarry, an assistant commissary of subsistence for and on the behalf of the United States, invited proposals for furnishing potatoes for the subsistence department of the United States army, by publication in several of the daily newspapers of the city of Cincinnati, and by posting in the office of the United States commissary of subsistence in said city an advertisement of which (as they are advised by their counsel) the material parts to be here set out are as follows:

"Sealed proposals (from loyal citizens only) will be received
2 at this office until 11 a. m., June 22d, for furnishing the following articles for the subsistence department United States army:

"Potatoes.—In strong barrels, full head lined; to be of the best kind, perfectly sound, and in prime shipping order.

"To be delivered free of expense to the United States at the United States subsistence storehouse in Cincinnati, Ohio, in such quantities, (not exceeding three thousand bushels per week,) and at such times as may be required during the month of July, 1863. Bids must state the kinds proposed to be delivered, and the price per bushel of sixty pounds, delivered as above specified.

"Bids will be received for any part of the above quantities or for the whole. All articles will be carefully inspected on the part of the subsistence department, and none will be accepted or paid for that do not pass such inspection."

And in another part of said proposals, it is stated:

"The accepted bids will form the basis of written contracts of the usual form, and bonds with two sureties in a penal sum equal to one third the amount of the contract will be required."

All of which will more fully and at large appear, by referring to a copy of said proposals herewith attached, (marked A,) and made part of this petition.

And on the said twenty-second day of June, A. D. 1863, pursuant to said proposals, your petitioners, by letter of that date, offered to the said Major DuBarry, as commissary, twelve thousand bushels of

peach-blow potatoes, to be delivered as follows: Three thousand bushels first week in July, three thousand second week in July, and balance as may be called for, at eighty-five cents per bushel, and to deliver said stores on or before the thirty-first day of July, A. D. 1863, in strict compliance with the terms of the above-mentioned advertisement, all of which will more fully appear by reference to a copy of said letter herewith filed as part of this petition, (marked B.)

And your petitioners further show that on the same twenty-second day of June, A. D. 1863, at Cincinnati, Ohio, the said Major DuBarry, by letter of that date, signed by said DuBarry, assistant commissary, and directed to your petitioners at Cleveland, Ohio, advised your petitioners that their bid for potatoes was accepted at eighty-five
3 cents, except for the first delivery, which said commissary got at eighty cents. All of which will more fully and at large appear by a copy of said letter herewith filed as part of this petition, (marked C,) to which they ask leave to refer for greater certainty.

And your petitioners further show that they received the letter last mentioned, and in reply thereto, by letter written, dated, and mailed at Cleveland, Ohio, on the twenty-third day of June, A. D. 1863, addressed to the said Major DuBarry, commissary of subsistence, at Cincinnati, Ohio, they advised said DuBarry, commissary as aforesaid, that his letter of the twenty-second, advising of acceptance of the said bids of said J. H. Clark and Company, at eighty-five cents per bushel for all except the first delivery, was duly received, and that your petitioners by said letter (of said DuBarry) understood that your petitioners were to furnish nine thousand bushels or three thousand per week after the first week; and further therein stated, "if so. all right; we will endeavor to meet it promptly," all of which will more fully appear by a copy of said letter herewith filed as part of this petition, (marked D,) to which they refer for greater certainty.

And your petitioners now claim that by said correspondence in writing, a contract was duly made, by which your petitioners were to furnish and deliver nine thousand bushels of "peach-blow potatoes," of the best kind, perfectly sound, and in prime shipping order, in strong barrels, full head lined, and in such quantities as may be from time to time required, not exceeding three thousand bushels per week, on such days as should be designated by the commissary of subsistence, between the seventh day of July, A. D., and the first day of August, A. D. 1863, at the United States subsistence storehouse in Cincinnati, Ohio, at eighty-five cents per bushel for every bushel of potatoes (sixty pounds to be considered a bushel) delivered and accepted under said contract.

And that said contract was to be in force twenty-four days, or such less time as the Commissary General might direct, and subject to his approval, and was to commence on the eighth day of July, 1863.

And the United States, by said assistant commissary of subsistence, then and there being duly anthorized in that behalf, agreed on the part of the United States to receive nine thousand bushels of
4 said potatoes, of the kind and quality, to be delivered at the times and place above stated, and to pay for the same the sum of eighty-five cents per bushel.

rther show that after said contract was made as
Major Beekman DuBarry caused to be posted up
s place in the office of the commissary of subsistence at
Ohio, certain awards of contracts, and among others a
ent in writing that a contract had been awarded to your
itioners for nine thousand bushels of potatoes at eighty-five cents
bushel.

And your petitioners further show that after said contract was
de as aforesaid, they gave bond with two good and approved sure-
viz: Joseph Perkins and H. B. Hurlburt, in the sum of twenty-
hundred dollars, conditioned (in substance) that they would well
truly do and perform all things that their said contract required
em to do and perform, which was sent by express to said DuBarry
d duly received and accepted by him as they believe; they have
copy thereof.

And now it is, that after said contract had been made by the written
orrespondence of the parties as aforesaid, and after the notice there-
ad been posted up in a conspicuous place in said office, that t
uantity of potatoes contracted for was nine thousand bushels as afore-
aid; the said DuBarry caused certain articles of agreement to be
rawn up, dated June twenty-second, eighteen hundred and sixty-
three, in which articles of agreement, among other things it is pro-
vided that the said J. H. Clark and C. A. Smith, (your petitioners,)
shall deliver at the United States subsistence storehouse, in the city
of Cincinnati, Ohio, potatoes of the best kinds, perfectly sound, and
in prime shipping order, in strong barrels, full head lined, in such
quantities as may be from time to time required, not exceeding three
thousand bushels per week, on such days as shall be designated by the
commissary of subsistence, and should receive therefor eighty-five
cents for every bushel of said potatoes; all of which (with other mat-
ters in said articles of agreement stated) will more fully and at large
appear by a copy of said articles of agreement herewith filed, (marked
E,) and made part of this petition; to which your petitioners ask
leave to refer for further details of said agreement and for greate
certainty. And your petitioners, about the seventh day
5 July, A. D. 1863, signed said articles of agreement, not kno
ing at the time but that they truly and fairly stated the
tual agreement of the parties thereto, and without the advice
friends or counsel thereon, but have since discovered that the
tract is not truly stated by said articles, and, by mistake or by f
the quantity of potatoes to be delivered by your petitioners and
received by the United States, (viz: nine thousand bushels,) is
omitted. But your petitioners are advised by their counsel, t
omission is not material herein, because the contemporary co
dence of the parties, signed by the parties herein above set fo
[illegible] that the quantity contracted to be delivered and
nine thousand bushels of potatoes.

to your petitioners further show that promptly after said co
the [illegible] before said articles of agreement were signed
to purchase, and did purchase, at Buffalo, in

New York, about ten thousand bushels of pot[illegible] tract, and shipped them from time to time to th[illegible] in the State of Ohio, and did deliver upon the req[illegible] Major DuBarry, commissary as aforesaid, one hundr[illegible] one (191) bushels of said potatoes, and have been paid [illegible] toes so delivered as aforesaid the sum of one hundred and six[illegible] dollars and fifty-nine cents, as will more fully appear by referenc[illegible] the bill herewith filed as part of this petition, (marked F,) and [illegible] ferred to for greater certainty.

And your petitioners further show that they were at all t[illegible] ready and willing to deliver to the said Major DuBarry, at said st[illegible] house in the city of Cincinnati, in the State of Ohio, eight thous[illegible] eight hundred and eight and forty-three-sixtieths (8,808$\frac{43}{60}$) bushe[illegible] the residue of said nine thousand bushels of "peach-blow" potat[illegible] of the best kinds, perfectly sound and in prime shipping order, [illegible] strong barrels, full head lined, and in such quantities not exceedi[illegible] three thousand bushels per week, and on such days as should [illegible] designated by the commissary of subsistence; and were ready an[illegible] willing during the whole of said time between the seventh day [illegible] July and the first day of August, A. D. 1863, in all respects to com[illegible] ply with said contract, and to do and perform all things whatsoeve[illegible] that by the terms of the contract between the parties they were[illegible] bound to do or ought to have done and performed on their part, a[illegible]

6 that the said Major Beekman DuBarry, commissary as af[illegible] said, was duly advised of the readiness and willingness of y[illegible] petitioners to deliver said potatoes at the times and pl[illegible] when and where they should have been delivered and received, b[illegible] the said DuBarry, commissary aforesaid, wrongfully re[illegible]d to r[illegible] ceive said potatoes, or any more thereof than said quantity of on[illegible] hundred and ninety-one and seventeen-sixtieths bushels before men[illegible] tioned, and suffered the whole residue thereof, to wit, eight thousand[illegible] eight hundred and eight and forty-three sixtieths bushels of said po[illegible] tatoes to rot on the hands of your petitioners, and be utterly lost to [illegible] them.

Your petitioners further show that on the first day of August, [illegible] D. 1863, at the office of the commissary of subsistence, at Cincin[illegible] i, Ohio, they demanded payment of the said DuBarry, commissary [illegible] foresaid, of the sum of seven thousand four hundred and eighty-[illegible] n dollars and forty-one cents, which was refused.

[illegible]d your petitioners show that they applied to the Commissary [illegible] al of Subsistence of the United States for payment for said [illegible] s, at said sum of eighty-five cents per bushel, but that pa[illegible] the same was refused; and that they petitioned the thirty-[illegible] ongress of the United States for relief herein, and Congress, [illegible] esolution, approved May 26, 1864, referred the matter to [illegible] of Claims, as will more fully appear, reference having had [illegible] of said joint resolution hereto attached as evidence, and [illegible]

[illegible] tioners therefore pray that you will, after hearing the[illegible] [illegible] ment for the sum of seven thousand four hundred

dollars and forty-one cents in favor of your petitioners, them such other relief herein as may be proper.
they will ever pray, &c.

JARED H. CLARK.
C. A. SMITH.

JOHN JOLLIFFE,
Their Solicitor.

THE STATE OF OHIO, *Cuyahoga County, ss:*

Personally appeared before me, a justice of the peace in and for said county, Jared H. Clark, one of the claimants named in the foregoing petition, who being duly sworn on his oath, states that no assignment or transfer of the claim mentioned in petition, or any part thereof, or any interest therein, has been e; that said claimants are justly entitled to the amount therein ned, after allowing all just credits and offsets, and that he be- es the facts, as stated in said petition, are true.

JARED H. CLARK.

ubscribed and sworn to before me this 7th day of June, 1864.
STAMP.] G. H. BENHAM,
Justice of the Peace.

Exhibits.

A.

Proposals.—Army stores.

OFFICE U. S. COMMISSARY OF SUBSISTENCE,
No. 32 Vine Street, Cincinnati, Ohio, June 15, 1863.

Sealed proposals (from loyal citizens only) will be received at this office until 11 a. m. June 22, 1863, for furnishing the following articles for the subsistence department, United States army:

Potatoes.—In strong barrels, full head lined, of the best kind, perfectly sound, and in prime shipping order.

To be delivered free of expense to the United States, at the United States subsistence storehouse in Cincinnati, Ohio, in such quantities (not exceeding 3,000 bushels per week) and at such times as may be required during the month of July, 1863.

Bids must state the kinds proposed to be delivered, and the price per bushel of sixty pounds, delivered as above specified.

Bids will be received for any part of the above quantities, or for the whole.

All articles will be carefully inspected on delivery by an inspector on the part of the subsistence department, and none will be accepted or paid for that do not pass inspection.

Payments will be made in such government funds as may be supplied by the treasury, on the faithful fulfilment of the contract by the

The right to reject any or all of the bids is reserved.

bids will form the basis of written contracts of the

usual form, and bonds with two sureties in a penal sum equal
third the amount of the contract will be required. T
9 sponsibility of the sureties must be certified to by the cler
a court of record or by the United States district attorney
the district in which the party resides.

Proposals must be enclosed in an envelope addressed to the undersigned, and indorsed "proposals for potatoes."

A copy of this advertisement (a slip from a newspaper) must be attached to each proposal, and proposals must be on blank forms, which will be supplied on application to this office. Proposals must be signed by the parties themselves, and not by clerks, agents, &c.

Bidders are invited to be present at the opening of the bids.

B. DUBARRY,
Major and C. S., U. S. A.

B.

Place of business—CLEVELAND,
Date—*June* 22, 1863.

The undersigned, regularly engaged in produce commission business, in response to your advertisement dated the 15th day of June, 1863, hereby offer for sale to the subsistence department of the United States army the following stores, viz: twelve thousand bushels peach-blow potatoes, as follows: three thousand first week in July, three thousand second do., and balance as may be called for, at ($0 85) dollars and eighty-five cents per bushel; and should this proposal be accepted, we hereby bind ourselves to deliver the stores on or before the 31st day of July, 1863, in strict compliance with the terms of your advertisement, a copy of which is hereunto attached.

Signatures—(Signed) J. H. CLARK & CO.

The undersigned hereby solemnly attest that no person entertaining disloyal sentiments towards the government of the United States of America is or ever shall be, either directly or indirectly, interested in the stores hereby offered for sale.

Signature—(Signed) J. H. CLARK & CO.

To Major DUBARRY, *C. S., U. S. A.*

10 C.

CINCINNATI, OHIO, *June* 22, 1863.

GENTLEMEN: Your bid for potatoes is accepted at eighty-five cents, except for the first delivery, which I get for eighty cents.

Please inform me by return mail of the names and residences (county and State) of the members of the firm, as it is necessary that all should appear in the written contract. As soon as received I will have the papers drawn up and forwarded to you for signature.

Respectfully, &c.,

B. DUBARRY,
Major C. S., U. S. A.

Messrs. J. H. CLARK & Co.,
Cleveland, Ohio.

D.

CLEVELAND, *June* 23, 1863.

Maj. DuBarry, C. S., Cincinnati.

DEAR SIR: Yours of the 22d advising of acceptance of our bids at eighty-five cents per bushel for all except the first delivery, is duly received.

By this we understand we are to furnish 9,000 bushels, or 3,000 bushels per week after the first week; if so, all right, we will endeavor to meet it promptly.

The names of our firm are J. H. Clark and C. A. Smith, all of Cleveland and county of Cuyahoga, State of Ohio. Please advise us at what time you will want first shipment.

Respectfully, yours,

J. H. CLARK & CO.

E.

Articles of agreement made this twenty-second day of June, eighteen hundred and sixty-three, between Major Beekman DuBarry, commissary of subsistence in the service of the United States of America, of the one part, and J. H. Clark and C. A. Smith, of the city of Cleveland, Cuyahoga county and State of Ohio, constituting the firm of J. H. Clark & Co., on the other part.

11 This agreement witnesseth, that the said Major Beekman DuBarry, commissary of subsistence, for and on behalf of the United States of America, and the said J. H. Clark and C. A. Smith, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other, in the manner following, viz:

First. That the said J. H. Clark and C. A. Smith shall deliver at the United States subsistence storehouse in the city of Cincinnati, Ohio, potatoes of the best kinds, perfectly sound and in prime shipping order, in strong barrels, full head lined, in such quantities as may be from time to time required, not exceeding three thousand bushels per week, on such days as shall be designated by the commissary of subsistence. This contract shall be in force twenty-four days, or such less time as the Commissary General may direct and subject to his approval, and shall commence on the eighth day of July, eighteen hundred and sixty-three.

Second. The said J. H. Clark and C. A. Smith shall receive eighty-five cents per bushel for every bushel of potatoes, (sixty pounds to be considered a bushel,) delivered and accepted under this contract.

Third. Payment shall be made upon the faithful fulfilment of the contract by the party of the second part in such funds as may be supplied by the Treasury of the United States.

Fourth. That the potatoes and packages shall be carefully inspected by an inspector on the part of the United States, and none shall be accepted and paid for that shall not pass such inspection.

Fifth. That in case of failure or deficiency in the quality or quantity of potatoes, stipulated to be delivered, then the commissary of

subsistence shall have the power to supply the deficiency by purchase, and the said J. H. Clark and C. A. Smith shall be charged with the difference in cost.

Sixth. No member of Congress shall be admitted to any share herein, or any benefit to arise therefrom, and that this contract is not transferable.

In witness whereof the undersigned have placed their hands and seals the day and date above written.

B. DuBARRY,
Maj. C. S., U. S. A.
J. H. CLARK,
C. A. SMITH.

Witness: GEO. W. GARDNER.

12 F.

CLEVELAND, OHIO, *July* 31, 1863.

United States commissary department, Cleveland, Ohio, bought of J. H. Clark & Co., 9,000 bushels potatoes at 85 cents per bushel $7,650 00

1863. CR.

Oct. 15. By cash of Major B. DuBarry for 70 barrels, 191 11/60 bushels potatoes at 85 cts 162 59

Balance due 7,487 41

Payment was demanded for the above balance of Major DuBarry, C. S., U. S. A., at his office in Cincinnati, Ohio, on the first day of August, 1863, and refused.

G.

Joint resolution referring to the claim of J. H. Clark & Co. to the Court of Claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of J. H. Clark & Co., heretofore pending before Congress, be, and the same hereby is, referred to the Court of Claims.

Approved, May 26, 1864.

DEPARTMENT OF STATE,
Washington, May 30, 1864.

A true copy.

W. HUNTER, *Chief Clerk.*

13 In the Court of Claims.—October term, 1864.

JARED H. CLARK & Co.
vs.
THE UNITED STATES. } No. 2,099.

And now come the United States, by Charles Gibson, their solicitor, and say that they are not indebted unto the said claimant in the said sum of $7,487 $\frac{44}{100}$, nor any part thereof.

And as to so much of said petition as avers that the claimant has at all times borne true allegiance to the government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants say that they are not advised of the truth of said allegations, and therefore deny the same.

CHARLES GIBSON,
Solicitor for United States.

July 6, 1864.

14 In the Court of Claims.

JARED H. CLARK & Co.
vs.
THE UNITED STATES. }

And now, to wit, January 15th, 1866, the court, upon due consideration of the premises, do find in favor of the claimants, and do order, adjudge, and decree, that the said Jared H. Clark and Carlos A. Smith, late partners as J. H. Clark & Co., do have and recover of and from the United States the sum of two thousand five hundred and fifty dollars, ($2,550.)

15 In the U. S. Court of Claims.—No. 2,099.

JARED H. CLARK and CARLOS A. SMITH, late partners, as J. H. Clark & Company.
vs.
THE UNITED STATES. }

To the honorable the Court of Claims of the United States:

Your petitioners, Jared H. Clark and Carlos A. Smith, late partners in business, under the name and style of J. H. Clark & Co., humbly complaining, show unto your honors: That on the fifteenth day of January, in the year of our Lord one thousand eight hundred and sixty-six, this court, in the above-entitled and above-numbered cause, rendered judgment in favor of your petitioners for the sum of two thousand five hundred and fifty dollars, and no more; which judgment yet remains in full force and wholly unpaid. And your petitioners are greatly injured and aggrieved by the said judgment, and at this term filed their petition in and to this court for a rehearing of said cause; which rehearing was refused by this court; all of which will there fully and at large appear, reference being had to the original

petition in said cause, numbered 2,099 of this court, and the several exhibits thereto, and to the said petition for a rehearing aforesaid.

Your petitioners aver, that this court erred, greatly to the injury of your petitioners, in their judgments in said cause; and they humbly pray that you will allow them to appeal this cause to the Supreme Court of the United States, so that the several errors of this court of which your petitioners complain, and by which they have been injured, may be corrected by the said Supreme Court; which errors are as follows, to wit:

First. The said Court of Claims, on the said fifteenth day of January, in the year eighteen hundred and sixty-six, entered judgment in favor of your petitioners for the sum of two thousand five hundred and fifty dollars, and no more; whereas by the law of the land the said judgment should have been for not less than the sum of seven thousand four hundred and eighty-seven dollars, (as is claimed by your petitioners in their original petition in this cause.)

Secondly. And your petitioners further complaining show, that the said Court of Claims in determining said cause adjudged and decided that exhibits marked respectively, A, B, C, D, made part of their original petition, (the execution of which exhibits was fully proved to the satisfaction of the said Court of Claims,) did not prove, exhibit, and contain the contract between your petitioners upon the one part, and the United States upon the other part, acting therein by Beekman DuBarry, major and commissary of subsistence; and the said court adjudged and decided that the paper marked exhibit E (also made part of their original petition herein, and the execution thereof was also fully proved to the satisfaction of the said Court of Claims) did prove, exhibit, and contain the true agreement of the said parties; by which opinion and judgment your petitioners are greatly injured and aggrieved.

Thirdly. Your petitioners further show, that they are injured and greatly aggrieved by the decision of the said Court of Claims in said cause, in this: that whereas the real and true intent and meaning of the parties to the agreement made in writing, and as the same is exhibited, contained, and proved by the said several exhibits to their original petition, herein marked, respectively, A, B, C, D,
16 E, was, that the said J. H. Clark & Co. should furnish and deliver to the United States, at the place and times stated in said exhibits, the quantity of nine thousand bushels of potatoes, and that the United States at said place and times should receive of and from your petitioners the said quantity of nine thousand bushels of potatoes; but the said Court of Claims decided and adjudged that the United States was not bound by the said contract in writing to receive nine thousand bushels of potatoes of your petitioners, or to receive any other definite quantity of potatoes from your petitioners.

Fourthly. Your petitioners further show, that they are injured and greatly aggrieved by the decision and judgment of the said Court of Claims, in this: that the said Court held, adjudged, and decided that no "fraud" was committed by the said Major Beekman DuBarry;

that no mistake was made by him in drawing up the paper marked exhibit E to the original petition, (and which purports to be the articles of agreement made by your petitioners on the one part, and the said DuBarry, commissary as aforesaid, upon the other part,) in such manner as wholly to omit to state therein that the quantity of potatoes to be delivered by the one party, and to be received by the other party, was nine thousand bushels; and in such manner as wholly to omit to state any quantity of potatoes to be delivered by the one party, and to be received by the other party, to the said articles of agreement; whereas the written evidence contained in the several exhibits aforesaid, marked A, B, C, and D, does prove that "fraud" was committed, or "mistake" made by the said DuBarry, in so drawing up the said articles of agreement; as charged by your petitioners in their original petition.

Wherefore your petitioners pray that they may have their appeal herein as above prayed for; and that the said several errors may be corrected; and as in duty bound, they will ever pray, &c.

JOHN JOLLIFFE,
Solicitor for Petitioners.

April 13, 1866.

17 *Petition for appeal, &c.*

In the Court of Claims.

JARED H. CLARK *et al.*
vs.
THE UNITED STATES.

The court certify the following alterations and modifications of the points decided in this case:

1st. That the written agreement, upon which the suit is founded, witnesses truly the contract between the parties, and determines their relative rights and obligations in the case.

2d. That the allegation of fraud or mistake in the concoction of the written agreement is not sustained by the evidence in the case.

18 3d. By this written agreement, and according to its true interpretation, no definite number of bushels of potatoes were sold or agreed to be sold to the United States.

4th. By the terms of the contract, the claimants could not be called upon for the delivery of more than three thousand bushels in any one week, and only for the three latter weeks of the month of July.

5th. That the contract requiring him to have that quantity on hand to meet any requisition that might have been made upon him by the commissary, and no requisition being made upon him for that quantity, he is entitled to be paid the actual loss sustained upon that number of bushels.

19 In the Court of Claims.

JARED H. CLARK and CARLOS A. SMITH, late partners, as J. H. Clark & Co.,
vs.
THE UNITED STATES.

I, Sam'l H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing is a true transcript of the proceedings in the above-entitled case, and of the judgment of the court thereon; and of the petition of the claimants for the allowance of an appeal with the alterations and modifications of the points decided and alleged for error as certified by the court.

In testimony whereof I have hereunto set my hand and affixed seal of said court, at Washington, this 28th day of June, A. D. 1866.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk of the Court of Claims.

Attest: JOS. CASEY,
Ch. J. Ct. of Cl.

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At a Court of Claims held at the Capitol in the city of Washington, on Wednesday, the 25 day of April, A. D. 1866.

JARED H. CLARK *et al.*
vs.
THE UNITED STATES.

The above-entitled case is submitted on petition of appeal to the Supreme Court of the United States.

At a Court of Claims held at the Capitol in the city of Washington on Thursday, the 21st day of June, A. D. 1866.

JARED H. CLARK *et al.*
vs.
THE UNITED STATES.

Ordered, that the appeal in the above-entitled case be allowed, and that it be certified with such alterations and modifications of the petition for the same as filed by the court.

A true copy of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 17th day of October, A. D. 1866.

[SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

Attest:

JOS. CASEY, *Ch. J.*

Filed 24th October, 1866.

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SUPREME COURT OF THE UNITED STATES.

No. 113.

JAMES H. CLARK AND CHARLES A. SMITH, AS J. H. CLARK, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This action was brought in the Court of Claims upon an alleged agreement between the appellants and one Major Du Barry an assistant commissary of subsistence, acting in behalf of the United States, for the purchase of a quantity of potatoes for the supply of the army.

The question of law raised upon this record is, whether the correspondence preceding the written contract between the appellants and the commissary shall be regarded as the agreement between the parties or the written contract.

It is alleged that the signature of appellants was obtained by fraud or mistake, (Record, p. 3;) but the court found (Record, p. 11,) that the alleged fraud or mistake was not found by the evidence, and decided that the written contract witnessed truly the contract between the parties.

It is submitted that upon this record the only question for this court to review is, whether the court below erred in deciding, as a matter of law, that the written agreement witnessed truly the contract between the parties. The question of fraud or mistake being one of fact, under the rule prescribed by this court, the decision of the Court of Claims is final.

As to the proposition of law raised upon the record, certainly no argument is necessary in this tribunal.

E. P. NORTON,
Solicitor for the United States.

United States Supreme Court.

No. 113.

Jared H. Clark and Charles A. Smith,
Late Partners as J. H. CLARK & CO.,

VERSUS

THE UNITED STATES.

ARGUMENT.

JOHN JOLLIFFE,
FOR PLAINTIFFS.

McGILL & WITHEROW, Printers, Washington, D.C.

Supreme Court of the United States.

No. 113.

DECEMBER TERM, 1867.

JARED H. CLARK AND CHARLES A. SMITH, LATE PARTNERS AS J. H. CLARK AND CO.,

vs.

THE UNITED STATES.

AN APPEAL FROM THE COURT OF CLAIMS.

The Court of Claims decided:

1. "That the written agreement upon which the suit is founded witnesses truly the contract between the parties, and determines their relative rights and obligations in the case.

2. "That the allegation of fraud or mistake in the concoction of the written agreement is not sustained by the evidence in the case.

3. "By this written agreement, and according to its true interpretation, no definite number of bushels of potatoes were sold or agreed to be sold to the United States.

4. "By the terms of the contract the claimants could not be called upon for the delivery of more than three thousand bushels in any one week, and only for the three latter weeks of the month of July.

5. "The contract requiring him (them) to have that quantity on hand to meet any requisition that might have been made upon him (them) by the commissary, and no requisition being made upon him (them) for that quantity, he is entitled to be paid the actual loss sustained upon that number of bushels."

I.

The written agreement referred to in the first of these points is Exhibit "E," entitled "Articles of agreement, made this twenty-second day of June, eighteen hundred and sixty-three," &c.; and the court say that "the suit is *founded* upon that agreement." That is, that the suit is brought upon that agreement.

Is this so?

The claimants state in their petition:

"And your petitioners now claim that *by said correspondence in writing, a contract was duly made*, by which your petitioners were to furnish and deliver nine thousand bushels of 'Peach-Blow Potatoes,' of the best kind, perfectly sound, and in prime shipping order, in strong barrels, full headlined, and in such quantities as may be, from time to time, required, not exceeding three thousand bushels per week, on such days as should be designated by the Commissary of Subsistence, between the seventh day of July, A. D. 1863, and the first day of August, A. D. 1863, at the United States Subsistence Storehouse in Cincinnati, Ohio, at eighty-five cents per bushel, for every bushel of potatoes (sixty pounds to be considered a bushel) delivered and accepted under said contract.

"And that the said contract was to be in force twenty-four days, or such less time as the Commissary General might direct, and subject to his approval, and was to commence on the eighth day of July, 1863.

"And the United States, by said Assistant Commissary of Subsistence, then and there being duly authorized in that behalf, agreed, on the part of the United States, to receive nine thousand bushels of said potatoes, of the kind and quality, to be delivered at the times and place above stated, and to pay for the same the sum of eighty-five cents per bushel.

"Your petitioners further show *that after said contract was made as aforesaid*, the said Major Beekman DuBarry caused to be posted up in a conspicuous place in the office of the Commissary of Subsistence at Cincinnati, Ohio, certain awards of contracts, and among others a statement in writing that a contract had been awarded to your petitioners for nine thousand bushels of potatoes, at eighty-five cents per bushel.

"And your petitioners further show that *after said contract*

was made as aforesaid, they gave bond with two good and approved sureties, viz: Joseph Perkins and H. B. Hurlburt, in the sum of twenty-five hundred dollars, conditioned (in substance) that they would well and truly do and perform all things that their said contract required them to do and perform, which was sent by express to the said DuBarry, and duly received and accepted by him as they believe; they have no copy thereof.

"And now it is, *that after said contract had been made by the written correspondence of the parties as aforesaid*, and after the notice thereof had been posted up in a conspicuous place in said office, that the quantity of potatoes contracted for was nine thousand bushels, as aforesaid, the said DuBary caused certain articles of agreement to be drawn up, dated June twenty-second, eighteen hundred and sixty-three. And your petitioners, about the seventh day of July, A. D. 1863, signed said articles of agreement, not knowing at the time but that they truly and fairly stated the actual agreement of the parties thereto, and without the advice of friends or of counsel thereon, but have since discovered that the contract is not truly stated by said articles, and that by mistake or by fraud, the *quantity* of potatoes to be delivered by your petitioners and to be received by the United States (viz: nine thousand bushels) is wholly omitted. But your petitioners are advised by their counsel that said omission is not material herein, because the contemporary correspondence of the parties, signed by the parties herein above set forth, does fully show that the quantity contracted to be delivered and received was nine thousand bushels of potatoes.

"Your petitioners further show that promptly *after said contract was made, and before said articles of agreement were signed*, they proceeded to purchase, and did purchase, at Buffalo, in the State of New York, about ten thousand bushels of potatoes to meet said contract, and shipped them," &c.

It would be difficult to draw a petition that would more clearly show that the suit is *not* founded upon Exhibit E, but is brought upon the contract made by the *correspondence of the parties*. And the petition charges that Exhibit E does *not* truly state the agreement between the parties, but that, by mistake or fraud, the quantity of potatoes to be delivered by the one party and received by the other is wholly omitted.

II.

The second and third points may be considered together, viz, that there was no proof of fraud or mistake; and that no definite number of bushels of potatoes were sold or agreed to be sold to the United States.

The plaintiffs claim that they agreed to *sell and deliver* to the United States *nine thousand bushels* of potatoes, and that the United States agreed to *receive and pay* for nine thousand bushels.

Everything is in writing, signed by the parties, so that it would seem this question can be easily determined.

The proposals, Exhibit A, state:

"To be delivered, free of expense to the United States, at the United States subsistence storehouse in Cincinnati, Ohio, in such quantities (not exceeding 3,000 bushels per week) and at such times as may be required DURING the month of July, 1863."

The phrase "*during the month of July*" means for the whole time of the month of July; as during the war means for the whole time of the war.

Three thousand bushels per week "*during* the month of July" is twelve thousand bushels. The advertisement, then, was for proposals for TWELVE thousand bushels of potatoes. This was signed and published by DuBarry, at Cincinnati, June 22, 1863.

J. H. Clark & Co. wrote to DuBarry at Cincinnati, (Exhibit B:)

B.

Place of business, "CLEVELAND,
"*June* 22, 1863.

"The undersigned, regularly engaged in produce commission business, in response to your advertisement dated the 15th day of June, 1863, hereby offer for sale to the Subsistence Department of the United States Army the following stores, viz, twelve thousand bushels peach-blow potatoes, as follows: three thousand first week in July, three thousand second do., and balance as may be called for, at ($0 85) dollars and eighty-five cents per bushel; and should this proposal be accepted, we hereby bind onrselves to deliver the stores on or before the 31st day of July, 1863, in strict compliance with the terms of your advertisement, a copy of which is hereunto attached.

Signatures—(Signed) "J. H. CLARK & Co."

To this DuBarry replied as follows:

C.

"CINCINNATI, OHIO, *June* 22, 1863.

"GENTLEMEN: Your bid for potatoes is accepted at eighty-five cents, except for the first delivery, which I set at eighty cents.

"Please inform me by return mail of the names and residence (county and State) of the members of the firm, as it is necessary that all should appear in the written contract; as soon as received, I will have the papers drawn up and forwarded to you for signature.

"B. DUBARRY,
"*Major, C. S. U. S. A.*

"Messrs. J. H. CLARK & Co.,
"*Cleveland, Ohio.*"

To which J. H. Clark & Co. replied:

D.

"CLEVELAND, *June* 23, 1863.

"Maj. DUBARRY, *C. S., Cincinnati:*

"DEAR SIR: Yours of the 22d, advising of acceptance of our bids at eighty-five cents per bushel for all except for first delivery, is duly received.

"By this we understand we are to furnish 9,000 bushels, or 3,000 bushels per week after the first week; if so, all right; we will endeavor to meet it promptly.

"The names of our firm are J. H. Clark and C. A. Smith, all of Cleveland, and county of Cuyahoga, State of Ohio. Please advise us at what time you will want first shipment.

"Respectfully yours,
"J. H. CLARK & Co."

In the letter of J. H. Clark & Co., dated June 22, 1863, (Exhibit "B,") they state:

"We hereby bind ourselves to deliver the stores on or before the 31st day of July, 1863, *in strict compliance with the terms of your advertisement*, a copy of which is hereto attached."

This made the advertisement (Exhibit A) part of the proposition. A printed copy of it was attached as part of the letter.

From these facts it follows that exhibits A, B, C, and D made the contract between the parties.

DuBarry seems to have been of the opinion that his letter of June 22, 1863, closed the agreement. But he was mistaken, because the proposals were for *twelve* thousand bushels; the bid of J. H. Clark & Co. was for *twelve* thousand bushels, and DuBarry's proposition of June 22 was to take from him only *nine* thousand bushels; and he assigned as his reason for not accepting the bid for twelve thousand bushels, that he got the first delivery (*three* thousand bushels) at eighty cents.

In Carr *vs.* Duval *et al.*, (14 Peters, 77,) on pages 82–83, this court said:

"The rule laid down by this court in Eliason *vs.* Henshaw, (4 Wheat., 228,) is, that an offer of a bargain by one person to another imposes no obligation upon the former unless it is accepted by the latter according to the terms in which the offer is made; and that any qualifications of a departure from the terms invalidate the offer, unless the same be agreed to by the person who made it. Until "the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation on either."

The same principle, and in the same words, is asserted in Eliason *vs.* Henshaw, (4 Wheat., p. 228.) In that case a bid was made for flour, and in a postcript an answer was requested to be sent by wagon to Harper's Ferry. The reply accepting the bid was sent by mail to Georgetown, and the court decided (page 229):

"That an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing."

The court further say that "the plaintiffs in error were the only judges of the importance of this qualification to their bid."

The same principle controlled the case of Head & Amory *vs.* The Providence Insurance Company, (2 Cranch, 127.)

There must be "a clear accession on both sides to one and the same set of terms." (Thomas *vs.* Blackman, 1 Colyear's Cases in Chy., p. 312. See, also, Brace *vs.* Pierson, 3 John. Rep., 534; Hazard *vs.* New England Marine Ins. Co., 1 Sumner, 218; Tuttle *vs.* Love, 7 John. Rep., 470; Hutchinson *vs.* Bowker, 5 Mee. & Wils., 535; Train *vs.* Gold, 5

Pick., 880; McIver *vs.* Richardson, 1 M. & Selw., 557; Jordan *vs.* Norton, 4 M. & W., 155.)

A proposition to purchase nine thousand bushels was not an acceptance of the offer to sell twelve thousand bushels of potatoes. If the negotiations had stopped at this point, neither party would have been bound.

But the next day (June 23) the plaintiffs replied:

"Yours of the 22d, advising of acceptance of our bids at eighty-five cents per bushel for all except the first delivery, is duly received.

"By this we understand we are to furnish nine thousand bushels, or three thousand bushels per week after the first week. If so, all right; we will endeavor to meet it promptly."

This closed the contract.

There was "a clear accession on both sides to one and the same set of terms."

And these terms proposed and accessions made to them were all in writing, signed by the parties.

The case of Tayloe *vs.* The Merchants' F. Ins. Co., 9 Howard, 390, controls the present.

In that case, on page 400, the court says:

"On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject in the mode contemplated at the time of entering upon the negotiation, *and the contract becomes complete.*"

And on page 402 the court says:

"The unqualified acceptance by one, of the terms proposed by the other, transmitted by due course of mail, is regarded *as closing the bargain, from the time of the transmission of the acceptance.*"

(See also 1 Parsons on Contracts, p. 407, 408, and cases there collected in notes *k* and *k k.*)

DuBarry, in his letter of June 23, says:

"Please inform me by return mail of the names and residence, (county and State) of the members of the firm, as it is necessary that all should appear in the written contract. As *soon as received* I will have the papers drawn up and forwarded to you for *signature.*"

This *excludes* the idea that DuBarry intended to make any change whatever by the articles of agreement to be "drawn up and forwarded for *signature.*"

And the reply (June 23) of J. H. Clark & Co.—"By this we understand we are to forward 9,000 bushels, or 3,000 bushels per week after the first week; if so, all right; we will endeavor to meet it promptly"—shows that they also regarded the terms of the agreement as settled.

Thus it is clear that, by the law, and by the understanding of the parties, the contract was made.

Nothing now remained but to draw up, in a formal manner, the agreement of the parties.

In the proposals, Exhibit A, which I have shown are part of the contract, it is stated:

"The *accepted bids* will *form the basis* of written contracts in the usual form."

And in DuBarry's letter of June 22 (Exhibit C) he states:

"It is *necessary* that ALL should appear in the written contract."

This "ALL" certainly includes "*the accepted bids*" which were to form "THE *basis of the written contracts of the usual form.*"

And as the contract was perfect as to its terms, it will not be considered otherwise than final, from the mere fact that a more formal instrument was by consent to be prepared.

Towle *vs.* Freeman, 9 Ves., 364.
Gibbons *vs.* N. E. Metropolitan Destitution Asylum, (11 Beavan, p. 1.)
Dart on Vendors and Purchasers, 104.
Sugden on Vendors, 114, 115.

The terms of the agreement could not be altered in any one respect. (Sugden on Vendors, 118.)

In Towle *vs.* Freeman, 9 Ves., 354, Sir William Grant, master of the rolls, said:

"The attorney could not introduce *the least variation* by his direction."

We are not asking for the consideration of parol evidence. Not a particle of our evidence is in parol. It is all in writing, and signed by the parties themselves, and not by their clerks, or attorneys, or agents.

Turn now to the articles of agreement as drawn up by DuBarry, and see whether "the *accepted bids* form the basis of the written contract?" See whether ALL appears in the written contract?

By that paper the quantity contracted to be delivered on the one side and received on the other is wholly omitted. J. H. Clark & Co. are to deliver potatoes, in such quantities as may from time to time be required, not exceeding three thousand bushels per week.

By this paper Du Barry was under no obligation to receive even a peck of potatoes per week, while J. H. Clark & Co. were to be bound to deliver three thousand bushels per week if DuBarry required them.

There were then either *fraud* or *mistake* in drawing up the articles of agreement; fraud if the quantity was wilfully omitted; mistake, if it was a mere oversight on the part of DuBarry.

Please keep in full view that DuBarry wrote for "the names and residences of the members of the firm, (Exhibit C,) and that this information was furnished by the same letter (Exhibit D) in which J. H. Clark & Co. state what they understood the contract to be.

Now the information obtained by that letter was used in drawing up the articles of agreement—"J. H. Clark and C. A. Smith, of the city of Cleveland, Cuyahoga county, and State of Ohio."

This proves two things:

First. That the articles of agreement are antedated 22d June, 1863. This is the same date of DuBarry's letter of inquiry, and one day before the letter of J. H. Clark & Co. giving the names and residences of the members of their firm.

Second. That the person who drew up the articles of agreement had the letter of J. H. Clark & Co. before him; because, from that letter he obtained the names and places of residence of the members of the firm, and inserted them in the paper called the articles of agreement.

This paper states that the price of the potatoes was "*eighty-five cents per bushel.*"

The price per bushel was part of the bid of J. H. Clark & Co. These two letters, (exhibits B and D,) of June 22 and 23, are to be taken together, and make one bid. That bid, as ultimately made, was—We will sell nine thousand bushels at eighty-five cents.

DuBarry had no right to tear out the price, eighty-five

This *excludes* the idea that DuBarry intended to make any change whatever by the articles of agreement to be "drawn up and forwarded for *signature.*"

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By this paper Du Barry was under no obligation to receive even a peck of potatoes per week, while J. H. Clark & Co. were to be bound to deliver three thousand bushels per week if DuBarry required them.

There were then either *fraud* or *mistake* in drawing up the articles of agreement; fraud if the quantity was wilfully omitted; mistake, if it was a mere oversight on the part of DuBarry.

Please keep in full view that DuBarry wrote for "the names and residences of the members of the firm, (Exhibit C,) and that this information was furnished by the same letter (Exhibit D) in which J. H. Clark & Co. state what they understood the contract to be.

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Second. That the person who drew up the articles of agreement had the letter of J. H. Clark & Co. before him; because, from that letter he obtained the names and places of residence of the members of the firm, and inserted them in the paper called the articles of agreement.

This paper states that the price of the potatoes was "*eighty-five cents per bushel.*"

The price per bushel was part of the bid of J. H. Clark & Co. These two letters, (exhibits B and D,) of June 22 and 23, are to be taken together, and make one bid. That bid, as ultimately made, was—We will sell nine thousand bushels at eighty-five cents.

DuBarry had no right to tear out the price, eighty-five

cents, and reject the quantity offered at that price. The bid was a whole, the contract a unit, one and indivisible. He might as well have accepted the nine thousand bushels at eight cents; as just as many bushels, and no more, as he chose to call for at eighty-five cents.

J. H. Clark & Co. state, in their letter of June 23, that the deliveries are to commence "after the first week" of July. The paper drawn up by DuBarry says, "shall commence on the eighth of July," &c.

The contract was to sell and deliver on the one part, and to receive and pay for on the other part, nine thousand bushels of potatoes. In ordinary mercantile transactions, the whole quantity sold is to be delivered at the warehouse of the purchaser. The parties can of course control this by contract. DuBarry was not a merchant, buying to sell again, but a Commissary of Subsistence for the United States Army. His purchases were made to be issued to the army, or hospitals, or camps, from time to time, as requisitions should be made upon him. Hence the *mode of delivery* was regulated by contract.

They were to be delivered—

First. At the United States subsistence storehouse, in Cincinnati, Ohio.

Second. In strong *barrels*, &c.

Third. In such quantities as should be required, not exceeding three thousand bushels per week.

Fourth. At such times as should be required, after the first week in July, 1863.

By this mode of delivery, Du Barry was relieved from the care of the potatoes until the day that he wanted them. Nine thousand bushels of potatoes, at sixty pounds per bushel, would probably have filled three thousand six hundred barrels, which, if delivered at once, would probably have filled the subsistence storehouse to the exclusion of all other articles. Hence the agreement was, that the nine thousand bushels were to be delivered *in such quantities * * as may be required.*" The phrase "*in such quantities as may be required*" regulates *the manner of delivery*, and not the quantity contracted for. It applied as well to the three thousand bushels which Du Barry got at eighty cents, to be delivered in the first week; as to the nine thousand to be delivered in the three following weeks in July. If Du Barry needed on Monday five hundred bushels for Camp Dennison; and on Tuesday two hundred bushels for the hospitals at Cincinnati; and on Friday twenty-three hundred bushels to be sent

by steamboat at the wharf, to the army of the Cumberland, at Nashville, he could make corresponding requisitions, and obtain not more than three thousand bushels in one week, according to the contract.

III.

The Court of Claims decided that—

3. "*By this written agreement, and according to its true interpretation, no definite number of bushels of potatoes were sold or agreed to be sold to the United States.*"

That there may be no mistake about the terms of this paper, and for convenient reference, I insert a copy of it:

E.

"Articles of agreement, made this twenty-second day of June, eighteen hundred and sixty-three, between Major Beekman DuBarry, Commissary of Subsistence, in the service of the United States of America, of the one part, and J. H. Clark and C. A. Smith, of the city of Cleveland, Cuyahoga county, and State of Ohio, constituting the firm of J. H. Clark & Co., on the other part.

"This agreement witnesseth, that the said Major Beekman DuBarry, Commissary of Subsistence, for and on behalf of the United States of America, and the said J. H. Clark and C. A. Smith, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other, in the manner following, viz:

"*First.* That the said J. H. Clark and C. A. Smith shall deliver, at the United States subsistence storehouse in the city of Cincinnati, Ohio, potatoes of the best kinds, perfectly sound and in prime shipping order, in strong barrels, full head lined, in such quantities as may be from time to time required, not exceeding three thousand bushels per week, on such days as shall be designated by the Commissary of Subsistence. This contract shall be in force twenty-four days, or such less time as the Commissary General may direct, and subject to his approval, and shall commence on the eighth day of July, eighteen hundred and sixty-three.

"*Second.* The said J. H. Clark and C. A. Smith shall receive eighty-five cents per bushel for every bushel of potatoes (sixty pounds to be considered a bushel) delivered and accepted under this contract.

"*Third.* Payment shall be made upon the faithful fulfillment of the contract by the party of the second part in such funds as may be supplied by the Treasury of the United States.

"*Fourth.* That the potatoes and packages shall be carefully inspected by an inspector on the part of the United States, and none shall be accepted and paid for that shall not pass such inspection.

"*Fifth.* That in case of failure or deficiency in the quality or quantity of potatoes stipulated to be delivered, then the Commissary of Subsistence shall have the power to supply the deficiency by purchase, and the said J. H. Clark and C. A. Smith shall be charged with the difference in cost.

"*Sixth.* No member of Congress shall be admitted to any share herein, or any benefit to arise therefrom, and that this contract is not transferrable.

"In witness whereof, the undersigned have placed their hands and seals the day and date above written.

"B. DU BARRY,
Maj., C. S. U. S. A.
"J. H. CLARK,
"C. A. SMITH.

"Witness—GEO. W. GARDNER."

The Court of Claims say that no definite number of "*bushels*" of potatoes were sold to the United States. The phraseology of the articles is "potatoes" of the best kind, &c. According to this paper, as drawn up by Du Barry, or under his order, no definite number of (not of "bushels" but) "potatoes," was sold. Du Barry, according to *that* paper, was not bound to *receive* even a dozen potatoes from J. H. Clark & Co.

J. H. Clark & Co. were to deliver in such quantities as may be *required*. There was no *obligation* upon Du Barry to *require* any quantity, or any number of potatoes.

This paper (Exhibit D) IS NULL, FOR THE WANT OF MUTUALITY OF OBLIGATION.

In Sykes *vs.* Dixon, (1 Perry & Davidson's Rep., 463; S. C., 9 Adolf & Ellis, 693,) there was a memorandum of agreement by which Bradley agreed to *work* for Sykes, for twelve months, signed by Bradley only, with no agreement on the part of Sykes to *employ* Bradley.

Lord Denman, C. J., said: "On these facts we are to say whether any valid contract for service existed between the parties. We think there did not, for the engagement is all on one side, and no reciprocal benefit was secured to Bradley."

Where an instrument was signed by the defendant in these terms—"Mr. J—, as you have a claim on my brother for £5 17s. 9d., for boots and shoes, I hereby undertake to pay the amount within six weeks"—it was held to be without consideration and void.

James *vs.* Williams, (5 Barn. & Adolf, 1109. Story on Contracts, chap. 17, sec. 431 a.)

A contract whereby the defendant agreed "to remain with Mrs. A for two years from the date hereof, for the purpose of *learning* the trade of dressmaker; was held to be a nude pact, there being no stipulation on Mrs. A's part to *teach* her the trade."

Lees *vs.* Whitcombe, (2 Moore & Payne, 86.)
Parsons on Contracts, book 2, chap. 9, p. 374, in note 9.
See also Chitty on Contracts, p. 15, and cases there referred to.
Addison on Contracts, pp. 25 and 32.
Berber *vs.* Beck, 6 Barr, 188.
Leach *vs.* Agnew, 7 Barr, 121.
Tucker *vs.* Woods, 12 John.'s Rep., 189.
Keep & Hale *vs.* Goodrich, 12 John.'s Rep., 396.
1 Chitty's Pl., (5 American Ed.) p. 265.

In Burnet *vs.* Bisco, (4 John's Rep., 235,) the defendant agreed in writing to *give* the plaintiff the refusal of his farm, but the plaintiff did not, on his part, agree that he would *take* the farm. Decided to be *nudum pactum*.

Du Barry certainly knew what he intended by this instrument, for after he had received one hundred and ninety-one and seventeen-sixtieths bushels of potatoes, he refused to receive any more; "required" no more; paid for no more; thus showing that he intended that the alleged articles of agreement should not be obligatory upon him.

The plaintiffs aver "that the contract is not truly stated by said articles, and by mistake or by fraud the quantity of potatoes to be delivered by your petitioners and to be received by the United States, (viz, nine thousand bushels,) is wholly omitted."

The Court of Claims decided "that the allegation of fraud or mistake in the concoction of the written agreement is not sustained by the evidence in the case."

And this appeal has been taken that you may decide the issue thus made.

If it shall be said that the plaintiffs waived the fraud, I deny the fact, and say there is no proof of it, but proof to the contrary. They could not waive the fraud or mistake without first discovering it; and they state that they signed this paper about

the 7th day of July, 1863, "not knowing at the time but that they truly stated the actual agreement of the parties thereto."

This paper was signed by them at Cleveland on the day next before the first delivery was to be made at Cincinnati; that is, after they had purchased potatoes; and sent them by railroad to Cincinnati; paid freight, rented a warehouse, or employed as their agent a man who had a warehouse, to receive the potatoes. Did they intend, after all this must necessarily had been done, to give up the contract, and let the potatoes rot on their hands? The deliveries were to be made in *July*, when the old crop was nearly gone, and before the new crop came in; in the hot climate of Cincinnati; and of articles which at that time of the year wilted or decayed with great rapidity.

The circumstances of the case prove that J. H. Clark & Co., on the 7th day of July, 1863, when they signed the articles, did not observe that the quantity of potatoes was not stated in the agreement.

There is, on the other hand, no evidence whatever that they consented to any change of the terms of the contract. The parties had no communication whatever, either verbally or by letter.

That Du Barry deceived them is one proposition; that, if Clark & Co. had been vigilant, they probably would not have been deceived, is another and a different proposition.

It is the very essence of fraud that the one party is deceived by the other in whom he has confided. If all men were vigilant, neither fraud nor theft would be committed.

It is the unwary, the unsuspecting, the confiding, who are entrapped and defrauded; and if the courts should refuse relief to such persons because they should have been more cautious and more vigilant, they may at once strike out from judicial remedies the whole chapter of frauds.

The length of that time this paper was written makes no difference in this case, and is a merely immaterial matter, because the fraud could just as well have been discovered in two minutes as in two years. J. H. Clark & Co. only needed to have their attention called to the omission at the first reading of the paper, and the matter would have been manifest in an instant.

We do not know, from the evidence, at what time J. H. Clark & Co. received the paper, whether on the 4th, 5th, or 6th of July. It is certain that the paper was antedated, because it is dated on the 22d, whereas the letter containing the names, &c., was written at Cleveland on the 23d.

Look, too, at the signature of Du Barry's letter of June 22d, "B. Du Barry, Major, C. S., U. S. A."

Who would have thought a man with the name of Du Barry; and that man a *Major*, and with five large capital letters after

that word "*Major*"—C. S., U. S. A.—would have been guilty of such conduct?

It is impossible to ascertain the extent of such influences upon men's minds, nor it is not important to do so. The question is, *were* J. H. Clark & Co. defrauded, and not *how* they were defrauded. After the whole matter has been done, and we look over the transaction as cool spectators, we may well be surprised at their credulity. But this remark applies with equal force to nearly every case of fraud that is reported in the law books. The party defrauded could have escaped it if he had been more careful.

They state that they did not know of the fraud or mistake in the instrument when they signed it. The Court of Claims did not discover it after two arguments—one on the hearing, and the other on motion for rehearing, in which the plaintiffs' counsel labored in vain to convince them that there was mistake or fraud in this paper.

Surely the plaintiffs, who are merchants, may be believed when they swear to this statement, that they did not know of the fraud or mistake. The oath was required for some purpose; and if it is not to be believed, especially in matters that lie exclusively within the knowledge of the person who makes it, (or that "he did not know,") it is difficult to see why it was required.

The whole matter is in a single sentence. If you reject any part of the statement, you reject the whole of it. If you accept any part of it, you accept the whole of it.

The whole sentence is:

"And your petitioners, about the 7th day of July, 1863, signed said articles of agreement, not knowing at the time but that they truly and fairly stated the actual agreement of the parties thereto, and without the advice of friends or of counsel thereon, but have since discovered that the contract is not truly stated in said articles, and that, by mistake or by fraud, the quantity of potatoes to be delivered by your petitioners, and to be received by the United States, (viz, nine thousand bushels,) is wholly omitted."

Now, if the counsel for the United States accepts part of the sentence, he takes the whole of it. If he rejects the sentence, then there is nothing to show but the articles were signed on the day they were received.

The plaintiffs could not be witnesses for themselves at the time this case was tried, under the recent acts of Congress.

Du Barry, in his letter of June 22d, states that "it is *necessary* that all should appear in the written contract, and that

he would have the papers drawn up," &c. This implies a promise that "*all*" would appear in the papers, as he would draw them up.

The articles were antedated; we do not know when they were sent to the plaintiff's, or when they were received—whether they were received on the day before they were signed, or a week before—nor is this material. The question is, whether the evidence sustains the charge that there was fraud or mistake "in the concoction of the written agreement," and not whether there was fraud or mistake known to the plaintiffs at the time they signed the paper and waived by them.

Excluding "the articles of agreement," this leaves the rights of the parties to be determined by the agreement made by the correspondence of the parties. The case, then, is within the rule of this court in Tayloe *vs.* The Merchants Fire Insurance Company, 9 Howard, 390.

IV.

But as these papers refer to the same subject-matter, and were written about the same time, (22d and 23d June,) between the same parties, they will be taken together, for the purpose of showing what was the true contract between the parties.

See Makepeace *vs.* Harvard College, (10 Pickering's Reps., 298.)

Perry *vs.* Holden, (22 Pickering, 269, 277, and cases there referred to.)

Rogers *vs.* Kneeland, (13 Wendall, 115.)

Montague *vs.* Tidcome, (2 Vernon's Reps., 519.)

Lawrence *vs.* Blackford (2 Vernon's Reps., 457.)

1 Forb. Equity, book I, sec. xiii, p. 435, 436; *Ibid*, Sec. xiv, p. 436.

If the terms of the contract (for the sale of real estate) can be collected from the correspondence of the parties, or from any two separate papers, referring manifestly to the same subject, it will be a sufficient memorandum within the 17th section of the statute of frauds.

W. W. Story's Contracts, sec. 489; Dobell *vs.* Hutchinson, 3 Adol. and Ell., 355; Smith *vs.* Surman, 9 Barn. and Cress., 561; Gale *vs.* Nixon, 5 Cowen, 445; Corbett *vs.* Arebell, 4 New and Man, 485; Johnson *vs.* Dodson, 2 Mees and W., 653.

"Marriage settlements are often reformed and varied so as to conform to the previous articles; and conveyances of real estate are in like manner controllable by the terms of the written contract. Memorandums of a less formal character are also admissible for the same purpose." (1 Story Eq. par. sec. 160;

note 2 on page 176, and note 1 on page 177, and cases there collected.)

In Finley *vs.* Lynn, 6 Cranch, 238, Chief Justice Marshall says:

"That a bond executed in pursuance of articles may be restrained by those articles if the departure from them be clearly shown, is not to be controverted."

See also Bradford *vs.* The Union Bank of Tennessee, 13 Howard, and especially on pages 66 and 67.

In this case the court reformed the contract, and decreed its specific execution as reformed under the same bill. And this may now be regarded as the well-settled practice of the courts of the United States.

The case of Johnson and others *vs.* Dodgson (2 Mees and Welsb.) is in point. It arose under the statute of frauds. A letter did not in express terms refer to the memorandum. Lord Abinger said: "If it rested upon the recognition of the contract by the letter, there might have been some doubt, although, even upon that, I should have thought the reference *to the only contract found in the case* sufficient."

V.

In this case there was but one contract. It has already been shown that the "articles of agreement" do refer to the contemporary correspondence between the parties by necessary inference: 1st. To get the names of the parties, and the style of their firm, and the city, county, and State in which they reside; 2d. To get the beginning of the deliveries; 3d. To obtain the price to be given per bushel for the potatoes; and such reference has the effect to incorporate the whole correspondence of the parties into the "articles of agreement," as much so as if they were all, and the advertisement, spread out in words and figures by tenor.

The rule that all antecedent conversations and agreements were merged in the final contract was not made to perpetrate fraud, but to prevent it. It has no application whatever to this case, or to cases like it. We are not seeking by *parol* to alter or vary the terms of a written contract. We are looking only at *all the writings* made between the parties at the same time that the articles of agreement were made, to learn what those writings advise as the true intent and meaning of the parties.

We are not asking for the consideration of parol evidence.

Not a particle of our evidence is in parol. It is all in writing, and signed by the parties themselves, and not by their clerks, or attorneys, or agents.

The court rendered judgment for $2,550 in favor of the plaintiffs. This proves that the potatoes were "of the best kind, perfectly sound, and in prime shipping order, and in strong barrels, full head-lined." And that the plaintiffs were in all respects ready and willing to do and perform, in due time, all that the contract required of them. Otherwise no judgment could have been rendered for the price of any quantity of the potatoes.

The points decided would necessarily have implied this; but here we have positive evidence of these facts.

The plaintiffs, then, are entitled to judgment for the full amount they claim in their petition, and we ask the court here to enter such judgment as the Court of Claims should have done; or to remand the cause to the Court of Claims, with instructions to enter judgment at this term of said court for the amount claimed by the plaintiffs in their petition.

All of which is respectfully submitted.

JOHN JOLLIFFE,
Counsel for J. H. Clark & Co.

WASHINGTON CITY, D. C., *January* 3, 1868.